No. 82-2145

In the Supreme Court of the United States

OCTOBER TERM, 1982

DAVID L. HOLTON, CHIEF INVESTIGATOR, SELECT COMMITTEE ON AGING, U.S. HOUSE OF REPRESENTATIVES ET AL., PETITIONERS

v.

GEORGE H. BENFORD, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF AUTHORITIES

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Petitioners, four members of the staff of the Select Committee on Aging of the United States House of Representatives, through the General Counsel to the Clerk of the United States House of Representatives, respectfully submit this supplemental petition for a certiorari to apprise the Court of late authorities and other intervening matters which were not available in time to have been included in the original Petition for a Writ of Certiorari. Sup. Ct. Rule 22.6.

The petition seeks review of the ruling by the United States Court of Appeals for the Fourth Circuit that a district court's pre-trial denial of congressional aides' claim of official immunity under *Harlow* v. *Fitzgerald*, 102 S.Ct. 2727 (1982) is not an appealable final order. *David Holton, Chief Investigator, et al.* v. *George H. Benford*, S.Ct. No. 82-2145 (July 1, 1983) Pet. for Cert. 12-13.

Recent developments since the filing of the petition by congressional aides emphasize the importance of granting certiorari to resolve the conflict in the circuits over the appealability of denials of claims of official immunity by government officials.

1. First, as previously indicated, Pet. for Cert., p. 13, n.6, the Clerk of the House of Representatives has been adjudged in contempt by the district court for Maryland for failure to produce legislative branch records pursuant to adoption of House Resolution 176. 126 Cong. Rec. H2450-2457 (daily ed., Apr. 28, 1983). At the time the petition was filed, the imposition of the $500 a day fine accompanying the contempt had been temporarily stayed to July 8, 1983, pending consideration of objections to be interposed by the Clerk, a filing of an appeal or purging of the contempt by compliance. Following rejection of the Clerk's objections and a motion for reconsideration the district court lifted the stay and refused to grant a stay of the contempt fine pending appeal. The Clerk subsequently applied for a stay of the contempt fine pending appeal in the court of appeals, which was granted by the court of appeals on August 22, 1983.[1]

2. In addition to the extensive documentary discovery being sought from the Clerk of the House, respondent has obtained orders from the district court compelling answers to questions posed during depositions of congressional aides concerning the investigation by the Select Committee on Aging into abusive sales practices. The congressional aides invoked their speech or debate clause right not to be "questioned" concerning the performance of legislative acts during deposition, *Gravel* v. *United States*, 408 U.S. 606, 612 (1972), *Eastland* v. *United States*

[1] The precise effect of the stay ordered by the court of appeals is unclear. The court did not stay the contempt fine "in its accumulation guise." Rather, the Court stated that "in the event the order should be finally affirmed on appeal we do not intend to be met with a contention that the stay of the order led to abrogation of the $500 per day civil contempt penalty, either *ab initio* and in its entirety or from and after the day of the entry of the stay." *See* Appendix A.

Servicemen's Fund, 421 U.S. 491, 501 (1975) and have appealed from the order compelling answers. *Helstoski* v. *Meanor,* 442 U.S. 500 (1979).[2]

These proceedings, involving broad ranging and intrusive probes into the Select Committee's investigation, and questioning of committee aides, heighten "the separation of powers concerns" at the core of the *Harlow* admonition to resolve the immunity claims of government officials on summary judgment "without resort to trial." 102 S. Ct. at 2736. And while the claim of immunity is being adjudicated "discovery *should not* be allowed." *Id.,* at 2739.

But the court of appeals' refusal to adjudicate the immunity claims by dismissing the petitioners appeal has fostered an escalating conflict with the House of Representatives over the permissible limits of a civil litigant's voracious appetite for discovery. This failure to establish on a nationwide basis the applicability of the *Harlow* ruling will only create further uncertainty and conflict in this and other cases.

3. On July 24, 1983 the insubstantiality of respondent's claims were previewed when the United States District Court for the Eastern District of Virginia granted a motion for directed verdict by congressional aides at the close of plaintiff's case alleging violation of the federal wiretapping statute, 18 U.S.C. §§ 2510 *et seq.*, in a companion case arising from the same Select Committee investigation. *Glenda C. Brown* v. *American Broadcasting Co., Inc.,* Civil Action No. 81-0871A (E.D. Va., July 25, 1983).

While initially denying the congressional aides pre-trial motion for summary judgment, as well as a request for a stay of the trial to permit appellate review of the congressional aides' immunity claims, the District Court dis-

[2] The court of appeals presently has under consideration: (1) a motion by respondent Benford to dismiss the appeal of the congressional aides as non-final, which has been opposed by petitioners Holton and Gardner; and (2) consolidation of the appeal of the Congressional aides with the appeal of the Clerk.

missed the case because of the lack of any evidence that congressional defendants violated the statutory rights of the plaintiff.

The District Court dismissal only *after* forcing congressional aides to face exposure to trial, despite the admonition of *Harlow* that insubstantial suits against government officials "without resort to trial," S.Ct. at 2736, emphasizes the intolerable state of affairs in the Fourth Circuit and the absolute necessity for resolving the existing conflict with the D.C. Circuit. *McSurely* v. *McClellan*, 697 F.2d 309 (D.C. Cir. 1982).

This companion case also undercuts respondent's assertion that the question is unworthy of consideration by this Court because it represents an isolated aberration and has no precedential impact. Obviously, district judges in the Fourth Circuit feel bound by its holding because the district court declined to stay the trial to permit congressional aides to appeal the denial of summary judgment.

4. Following filing of the petition for certiorari, counsel for petitioners became aware of other litigation, commenced by American Family Life Assurance Company ("AFLAC")—the insurance company for which respondent Benford acts as state manager for Maryland whose product was the subject of the sales meeting forming the basis for suit in this case—against the governor of Missouri for allegedly violating its civil rights, tortiously interferring with its contract rights and uttering falsehoods against it. *American Family Life Assurance Company of Columbus* v. *Teasdale*, No. 81-0317-CV-W-5 (W.D. Mo.).

Following a seven-day jury trial resulting in a jury verdict on all counts for the defendant, the court ordered plaintiff to pay a total of $63,287.31 to the former Governor for his attorneys' fees and expenses under the Civil Rights Act, 42 U.S.C. § 1988. *American Family Life Assurance Company of Columbus* v. *Teasdale*, 564 F.Supp. 1571 (W.D. Mo. 1983).

The District Court branded the litigation "vexatious, frivolous, groundless, meritless, unreasonable, [and] brought to harass or embarrass." 564 F.Supp. at 1572. After thus characterizing the efforts of American Family Life Assurance Company to harass the Governor, the district court referred to "testimony [at] trial . . . [which] indicated that the insurance company has filed similar suits against other parties who have publicly criticized the business practices of the cancer insurance industry. Most of these critical statements followed Congressional reports condemning the cancer insurance business." *Id.* at 1573. The court also noted that "[t]he insurance company has never won one of its suits." *Id.*

And finally, the district court lamented the state of the law which permits frivolous suits to reach juries and the abuse of process implicated by American Family's use of the judicial process vindictively against public officials protecting the public from sharp and unethical sales practices—the very same practices engaged in by representatives of American Family at issue in this case.

The recognition by the District Court in Missouri of the insubstantiality of American Family's claims, and its reference to other "similar suits," is further justification for instructing the courts of appeals to review such claims before trial and establishing a uniform rule for the federal courts in this area.

These additional developments since filing of the petition further support review of the case by this Court to decide the appealability question.

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APPENDIX A

United States Court of Appeals for the Fourth Circuit

No. 83-1653

In re: BENJAMIN J. GUTHRIE, CLERK,
U.S. House of Representatives.

MEMORANDUM AND ORDER

We here consider an application dated July 27, 1983 and filed July 28, 1983, for a stay of an order pending an appeal which has been timely lodged and should reach the Court for consideration and decision in the period of a few months' time. The case concerns activities of a commercial television system, operated by American Broadcasting Companies, Inc., and of several employees (congressional staff of the Select Committee on Aging) of the House of Representatives which the plaintiff, George H. Benford, contends were tortious, exposing them to liability for damages.[1] For prior evolutionary stages of the con-

[1] The congressional staff defendants arranged a television broadcast of a sales meeting conducted by the plaintiff filmed, it is alleged, without the knowledge or consent of the plaintiff, and surreptitiously attended by the defendants who were members of staff of the House Select Committee on Aging. The plaintiff claims invasion of privacy, malicious interference with business relations, civil conspiracy and

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troversy see *Benford* v. *American Broadcasting Cos., Inc.* 502 F. Supp. 1148 (D: Md. 1980), *aff'd* 661 F.2d 917 (4th Cir. 1981), *cert. den. sub nom. Holton* v. *Benford,* 454 U.S. 1060 (1981); *Benford* v. *American Broadcasting Co.,* 554 F. Supp. 145 (D. Md. 1982), *Appeal dismissed* (4th Cir. 1982), *petition for certiorari filed* (S. Ct. No. 82-2145, July 1, 1983); *Benford* v. *American Broadcasting Cos., Inc.,* Misc. No. 82-35 (District Court for the District of Columbia 1982).

In preparation for trial, the plaintiff has sought discovery of numerous documents located in the files of the House of Representatives and under the custody of Benjamin J. Gurthrie, the House's Clerk. The district court has, by its order of January 26, 1983, refused to quash a subpoena calling for production of the documents, thereby directing production of the documents. The House of Representatives, believing that the conduct of its affairs would be prejudiced by disclosure of the documents, or perhaps by a more general concern about the unrestricted availability of House files to inspection, has on April 28, 1983 adopted House Resolution No. 176 forbidding the Secretary to comply with the January 26, 1983 order of the district court. H.R. Res. 176, 98th Cong., 1st Sess., 129 CONG. REC. 2450 (1983). The district court has responded with its order of June 24, 1983 holding the clerk of the House of Representatives in civil contempt for refusal to comply with its January 26, 1983 order and imposing a fine of $500 for each day of continued refusal, *i.e.,* to accumulate until a purging of the contempt through compliance with the order of January 26, 1983 has occurred. The June 24, 1983 order provided that it should be stayed, *inter alia,* "to give the Clerk the opportunity to . . . appeal this decision . . . [such] stay . . . [to] continue so long as . . . an appeal remains undecided."

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violation of the Maryland Wiretapping and Electronic Surveillance Act (Maryland Code Annotated, Courts and Judicial Proceedings Article §§ 10-401 *et seq.*) the Fourth Amendment and the Federal Eavesdropping Statute (18 U.S.C. §§ 2510 *et seq.*).

On July 9, 1983 the district court denied a motion for reconsideration and lifted the stay.

The Clerk of the House of Representatives on July 12, 1983 appealed the order of June 24, 1983 adjudging him in contempt and the July 9, 1983 denial of a motion for reconsideration. He seeks a stay pending resolution of the appeal.

On July 14, 1983 the Clerk also requested a stay of the district court, which request, on July 16, 1983, was denied in part "and particularly because an appeal has now been filed, if a stay is to be imposed, it would more properly be ordered by the United States Court of Appeals for the Fourth Circuit."

Having reviewed the file and in particular the application for a stay, and the response of Benford thereto dated July 29, 1983 and filed August 8, 1983, we have reached the following conclusions and make the following observations:

1) A stay customarily is sought with respect to a district court order complete in its impact, particularly in the quantum of any relief provided. Here, however, the amount payable under the district court order continues to increase by $500 for each day that it remains uncomplied with. That consideration clouds the question of just what is the *status quo,* which a stay is intended to preserve.

2) The likelihood of success on appeal is shrouded in doubt. While there is much to be said for the concept that the House of Representatives, as an important component of one of the three elements comprising our Government, should have great flexibility and freedom in deciding whether, and, if so, to what extent, its files and the documents comprising them should be privileged and hence exempt from production, examination and copying, nevertheless recent events have indicated that absolute control in such matters is not to be accorded to one of the branches, the executive, the legislative or the judicial, in dispute with another. The history of efforts by Congress

to obtain assertedly privileged records from officials in the executive branch and by the judiciary to subpoena materials from the President of the United States, *see United States* v. *Nixon*, 418 U.S. 683, 706 (1974), demonstrates that the concept of separation of powers affords no complete answer, simply because the search for truth, requiring ready access to relevant or potentially relevant evidence, remains the cornerstone of our jurisprudence.[2] *See also*, D. Kaye, *Congressional Papers and Judicial Subpoenas*, 23 UCLA Law Rev. 57 (1975).

The district judge has evidenced, by his orders of June 24, 1983 and July 9, 1983, a conviction that the requisite balancing leads to a determination that the materials should be produced. Consequently, at the early appellate stage at which we now find ourselves, we are of the opinion that the plaintiff and the defendant each finds himself possessed of a substantial hope of success, which cannot, as against each other, be quantified until searching examination of the record connected with the hearing of the appeal itself has been completed. Each side has a reasonable, even substantial chance to win, and, consequently, each has a reasonable, even substantial chance to lose.

3) In terms of inconvenience and irreparability of injury, the scales weigh heavily in favor of the defendant. His superiors, comprising the House of Representatives, may have lost, with no opportunity to recapture, the confidentiality of the files and records if we deny the stay. Yet, on the other hand, if the stay is granted only a delay of at most a few months is to be predicted. While delay may sometimes amount to denial where justice is con-

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[2] To the extent that a determination such as that made in the instant case by the House of Representatives is deemed equivalent to the kind of decision that judges are required, as an everyday matter, to make, we note that a widespread concern must exist for the capacity of the House to achieve impartiality in the circumstances of the *Benford* litigation. The individual staff employees of Congress who are defendants have, and presumably have exercised, powers of access to House members not available to the plaintiff.

cerned, we do not perceive that to be the case here, in a case filed at some time prior to December 27, 1979 and so already more than three years of age. The stay, as we perceive matters, will occasion little harm to the plaintiff.

4) From the point of view of the public interest, clearly, it seems to us, the important question of the extent to which the documents here involved are privileged, when the House of Representatives has expressed its belief that the welfare of the country, *i.e.*, of the citizenry at large demands confidentiality, is an important one. It can only be answered if the stay is granted, for otherwise, presumably, the documents would be released to the plaintiff, and to that extent the question would become moot.[3]

5) Accordingly, consistent with the teachings of *Long* v. *Robinson*, 432 F. 2d 977 (4th Cir. 1970) and other cases addressing the considerations underlying a grant or a refusal of a stay pending appeal, we hereby order that the

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[3] In this connection, we are not unmindful of the possibility that the Clerk of the House of Representatives, responsive to the urging of his superiors, might continue to disregard a legal order, possibly even beyond the date, should it ever arrive, when the order of June 24, 1983 is affirmed, in whole or in part, on appeal. However, such an attack on a fundamental premise of civilized life, namely, that court orders are to be respected, is not assumed by us insofar as someone is concerned who has scrupulously to date abided by the rules, especially in making the application for a stay in the district court and again on appeal. The strain implicit in that assumption on the orderly conduct of governmental affairs is simply too great for us to make it or to allow it to affect our attempts to achieve a principled result.

order of the district court dated June 24, 1983 be and it hereby is stayed until further order of the Court.[4]

6) We further order that the stay shall apply to the order of June 24, 1983 only in its enforcement, and not in its accumulation guise. In other words, in the event the order should be finally affirmed on appeal we do not intend to be met with a contention that the stay of the order led to abrogation of the $500 per day civil contempt penalty, either *ab initio* and in its entirety or from and after the day of the entry of the stay.

7) The circumstances call for prompt resolution of the appeal. Accordingly, we further order that the appeal be expedited for hearing in accordance with such schedule as to exchange of briefs and date of argument as the Clerk of the Court shall establish.

With the concurrence of Judge Murnaghan.

DONALD S. RUSSELL,
United States Circuit Judge.

AUGUST 17, 1983.

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[4] We do not simply call for the order to regain its vitality automatically should the result of the appeal indicate that it is valid and enforceable. First, we perceive the possibility of revision in one or more respects of the order, even assuming that in large part it should persevere unscathed. Second, we anticipate that, in the event of a decision unfavorable to the Clerk of the House there will be an effort made to achieve review by certiorari by the Supreme Court of the United States. It simply seems inefficient to have an order automatically rearise when there will inevitably be uncertainty as to the status of things at the time the appeal is decided. Of course, nothing will preclude immediate application by Benford, if the outcome of the appeal warrants it, for resurrection of the order of June 24, 1983, in whole or in part.